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**Criminal Law—Reasonable Mistake of Age as
 Defense in Statutory Rape**

D had consensual sexual intercourse with prosecutrix, aged seventeen years, nine months, and was subsequently indicted for rape under a California statute providing an eighteen-year age of consent. Evidence of *D*'s belief that the female was above the statutory age was refused by the trial court, and *D* was convicted of statutory rape. *Held*, judgment reversed. Offer of proof of *D*'s reasonable belief that the prosecutrix had reached the age of consent could, when fully developed, demonstrate a sufficient basis upon which the trial court might find in *D*'s favor. *People v. Hernandez*, 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

This case represents an abrupt departure from the heretofore universally accepted doctrine that, in the absence of a specific statutory provision, a mistake as to the age of the female does not constitute a valid defense to a charge of statutory rape. *People v. Griffin*, 117 Cal. 583, 49 Pac. 711 (1897); *Heath v. State*, 173 Ind. 296, 90 N.E. 310 (1910); *Commonwealth v. Murphy*, 165 Mass. 66, 42 N.E. 504 (1896). Historically, no matter whether ignorance of the prosecutrix' age was based upon a good-faith belief that she was above the age of consent, *State v. Houx*, 109 Mo. 654, 19 S.W. 35 (1892), or on an exercise of reasonable care to ascertain her age, *Manning v. State*, 43 Tex. Crim. Rep. 392, 65 S.W. 920 (1901), or whether the defendant was misled by her appearance or her misrepresentations, *Campbell v. State*, 63 Tex. Crim. Rep. 595, 141 S.W. 232 (1911), he was still guilty of the offense if she was in fact below the age of consent at the time of the act.

The West Virginia courts have refused to accept the mistake of age defense. The accused's guilt is to be determined by the actual age of the female at the time of the act. *State v. Adkins*, 106 W. Va. 658, 146 S.E. 732 (1929).

As Perkins points out in his work on criminal law, the denial of the mistake of age defense is at variance with the reasonable mistake of fact doctrine. PERKINS, CRIMINAL LAW 127 (1957). Ordinarily, since criminal intention is of the essence of crime, if the intent is dependent upon a knowledge of particular facts, a want of such knowledge (not the result of carelessness or negligence) relieves the act of criminality. *Gordon v. State*, 52 Ala. 308 (1875); *State v. O'Neil*, 147 Iowa 513, 126 N.W. 454 (1910).

Statutory rape, however, falls into a class of cases which con-

stitutes an exception to this rule. On grounds of public policy, these acts are made punishable without proof that the defendant understood the facts that gave character to his act. Rather than the element of criminal intent being eliminated, the intent is deemed to be embodied in the defendant's decision to proceed at his peril, without regard to the age of the female and the consequences of his act. The conclusive presumption of non-consent of underage girls is customarily rationalized in terms of the young girl's lack of capacity to understand the nature and implications of the sexual act. *Golden v. Commonwealth*, 289 Ky. 379, 158 S.W.2d 967 (1942); *State v. Adkins*, *supra*. It is thought necessary for the protection of the immature female and of society in general that the defendant assume the risk of committing the crime of rape if the girl is in fact under the statutory age. *People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896); *State v. Adkins*, *supra*.

In the instant case, the court recognized that in the effort to provide a maximum protection for young girls, the law has frequently worked an injustice on the males by disallowing the mistake of age defense. In overruling *People v. Ratz*, *supra*, the court in the principal case pointed out a fallacy in the finding of criminal intent in these cases. It is difficult to see how a man who honestly and reasonably believes a girl to be over the age of consent can be said to possess the requisite intent to commit the crime of rape. The California rape statute is typical, providing that any act of sexual intercourse with a female, not the wife of the perpetrator, under the age of eighteen is rape. CAL. PENAL CODE § 261 (1960). The defense of mistake of age is not provided in the statute.

To label consensual sexual intercourse with a girl under the age of consent as rape has been recognized as unreasonable in a number of instances. Fundamental notions of justice where the male is concerned have resulted in the tempering of statutes through the inclusion of various provisos. Punishment may be dependent upon the age of the girl, or on the want of prior chastity or good reputation. See KY. REV. STAT. § 435.100 (1953); WASH. REV. CODE § 9.79.020 (Cum. Supp. 1961). Such a qualification was added to the West Virginia statute in 1931, when the requirement that the female must be of "previous chaste character" was included. The statute was amended in 1963 to make this requirement inapplicable to females under ten years of age. W. VA. CODE ch. 61 art. 2 § 15 (Michie Supp. 1964).

The Model Penal Code suggests that reasonable mistake of age be permitted as a defense in a prosecution for any sexual offense wherein the criminality of the conduct depends upon the victim being older than the age of ten. Model Penal Code § 213.6 (Proposed Official Draft, 1962). Sexual intercourse with a female under the age of ten is designated as rape, without provision for the mistake of age defense. MODEL PENAL CODE § 213.1 (Proposed Official Draft, 1962). The defense is denied because the writers of the Code felt that at that age, any error which is likely to be made would still have the girl far below the age for sexual pursuit by normal males. See MODEL PENAL CODE § 207.4, comment (Tent. Draft No. 4, 1956). Consensual sexual intercourse with a female between the ages of ten and sixteen is not termed rape, but rather is covered in a separate section entitled "Corruption of Minors and Seduction." Realizing that immature males may themselves be victims of adolescence rather than being engaged in the exploitation of others' inexperience, the writers inserted the requirement that a substantial age difference exist in favor of the male (four years suggested) before he may be subjected to the penalties of this section. MODEL PENAL CODE § 213.3 (Proposed Official Draft, 1962).

Illinois likewise declines to denominate consensual sexual relations involving adolescent girls as rape, and provides for the mistake of age defense. The stated purpose of the statute is to prevent the *knowing* and *deliberate* victimization of the young. ILL. REV. STAT. ch. 38, § 11-4 (1964).

Perkins contends that the refusal to allow a mistake of age defense to statutory rape is entirely proper. His view is that the act would have been unlawful and immoral even had the facts been as the accused believed them to be. Therefore, the mistake was to the degree of the crime rather than a mistake which would negate the idea of criminal intent. PERKINS, CRIMINAL LAW 127 (1957). This reasoning is subject to question. First, the legal wrong that the accused supposed he was committing is one that is to a great extent ignored or condoned by both society and the courts. Laws punishing illicit cohabitation or fornication are generally unenforced. PLOSCOWE, SEX AND THE LAW 155 (1951). Moreover, the advisability of punishing as rape an act which may or may not be considered as immoral by the peer groups of the actors is highly questionable. Behavior that has no substantial significance except to the morality of the parties involved is best left to the control of

religious, educational and social influences. MODEL PENAL CODE § 207.1, comment (Tent. Draft No. 4, 1956).

It must be recognized that in a heterogeneous community, different individuals and groups have widely divergent views of the seriousness of these acts. The assumption that age alone will bring an understanding of the sexual act is of doubtful validity. Both actual sexual experience and learning from the cultural group to which the girl belongs will determine her level of comprehension. A girl who belongs to a group whose members regularly indulge in sexual intercourse at an early age is likely to rapidly acquire an insight into the rewards and penalties her group assigns to these acts. However, other groups and the law itself may judge her conduct to be wrong, even though it is in conformity with the standards of her peer group. Moreover, when a girl thus acquires a great amount of knowledge at an early age, it is difficult to validate the law's naive assumption that the male is always entirely responsible for the act. 62 YALE L.J. 55 (1952).

The trend in criminal law toward not punishing consensual sexual relations where there is no element of notoriety, or victimization of the young, is in a larger sense but a practical application of modern philosophical concepts. No longer are morals and ethics viewed as governed by one absolute, universal standard. Rather, each individual is seen as having both the freedom and the responsibility to determine for himself the standards by which he must live.

"Man can will nothing unless he has first understood that he must count on no one but himself; that he is alone, abandoned on earth in the midst of his infinite responsibilities, without help, with no other aim than the one he sets for himself, with no other destiny than the one he forges for himself on this earth." SARTRE, BEING AND NOTHINGNESS 556 (1956).

Where the interests of society as a whole will be adversely affected by an individual's conduct, there then exists a valid reason for control by the state through criminal punishment. However, where the act has no material effect except in relation to the individual's own standards, it is best left to him to determine the permissibility of the conduct.

The Model Penal Code sets forth the most realistic approach to the regulation of the sexual experiences of the young. The immaturity of both sexes must be protected, but this must be achieved

without the punishment of the blameless. The requirement of a substantial age difference in favor of the male, and the provision for an affirmative defense of mistake of age are significant steps in the direction of providing justice in this area for all parties concerned.

Robin Wiseman

Criminal Law—Use of Presumptions To Shift Burden of Proof

The defendants were engaged in a lottery operation and were convicted under a federal statute that imposed criminal liability for willful failure to register for and pay a gambling tax. On appeal, conviction was reversed for lack of proof that the defendants had knowledge of the law, and thus lacked the willful intent necessary for conviction. The United States was granted a rehearing. *Held*, convictions affirmed. The court held that circumstantial evidence, aided or supplemented by a presumption that the defendants knew the law, would support a finding of knowledge sufficient to impose willful intent. *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964).

The court appears to hold that where willfulness is an essential element of a crime, the prosecution may be aided by a presumption that the accused knew the law, and if the accused does not offer evidence to rebut this presumption, the presumption may be used as probative force. This holding seriously affects the presumption of innocence where proof of a special mental element is necessary for conviction of a criminal act.

In the trial court, the jury was instructed that “[I]t is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law unless and until outweighed by evidence to the contrary. The presumption is that every person knows what the law forbids and what the law requires to be done.” The effect of this instruction is to establish willfulness on the strength of the defendants’ refusal to present evidence to the contrary.

The court in the principal case premises its holding upon a rule that where knowledge of certain facts is an essential element of a crime, the burden of going forward with evidence on the issue is sometimes placed upon the defendant if the matter is peculiarly